

Sep 13, 2019

SEAN F. MCAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

WILLIAM N.,

Plaintiff,

v.

ANDREW M. SAUL,
COMMISSIONER OF SOCIAL
SECURITY,¹

Defendant.

No. 2:18-CV-00145-RHW

**ORDER GRANTING
DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT**

Before the Court are the parties' cross-motions for summary judgment, ECF Nos. 12 & 15. Plaintiff brings this action seeking judicial review, pursuant to 42 U.S.C. § 405(g), of the Commissioner's final decision, which denied Plaintiff's

¹Andrew M. Saul is now the Commissioner of the Social Security Administration. Accordingly, the Court substitutes Andrew M. Saul as the Defendant and directs the Clerk to update the docket sheet. *See* Fed. R. Civ. P. 25(d).

1 application for Disability Insurance Benefits under Title II of the Social Security
2 Act, 42 U.S.C § 401-434. After reviewing the administrative record and briefs filed
3 by the parties, the Court is now fully informed. For the reasons set forth below, the
4 Court **GRANTS** Defendant’s Motion for Summary Judgment and **DENIES**
5 Plaintiff’s Motion for Summary Judgment.

6 **I. Jurisdiction**

7 Plaintiff filed his application for Disability Insurance Benefits on May 1,
8 2014. AR 50. His alleged onset date of disability is September 1, 2008. AR 125.
9 Plaintiff’s application was initially denied on August 25, 2014, AR 66-68, and on
10 reconsideration on October 8, 2014, AR 73-77.

11 A hearing with Administrative Law Judge (“ALJ”) Donna L. Walker
12 occurred on October 20, 2016. AR 36-49. On December 15, 2016, the ALJ issued a
13 decision finding Plaintiff ineligible for disability benefits. AR 23-30. The Appeals
14 Council denied Plaintiff’s request for review on March 12, 2008, AR 1-6, making
15 the ALJ’s ruling the “final decision” of the Commissioner.

16 Plaintiff timely filed the present action challenging the denial of benefits, on
17 May 11, 2018. ECF Nos. 1, 3. Accordingly, Plaintiff’s claims are properly before
18 this Court pursuant to 42 U.S.C. § 405(g).

19 **II. Sequential Evaluation Process**

20 The Social Security Act defines disability as the “inability to engage in any

1 substantial gainful activity by reason of any medically determinable physical or
2 mental impairment which can be expected to result in death or which has lasted or
3 can be expected to last for a continuous period of not less than twelve months.” 42
4 U.S.C. § 423(d)(1)(A). A claimant shall be determined to be under a disability only
5 if the claimant’s impairments are of such severity that the claimant is not only
6 unable to do his previous work, but cannot, considering claimant's age, education,
7 and work experience, engage in any other substantial gainful work that exists in the
8 national economy. 42 U.S.C. § 423(d)(2)(A). To be eligible for Social Security
9 Disability Insurance, a claimant must establish disability while he meets the
10 insured status requirements of the Social Security Act. 42 U.S.C. § 423(a)(1).

11 The Commissioner has established a five-step sequential evaluation process
12 for determining whether a claimant is disabled within the meaning of the Social
13 Security Act. 20 C.F.R. § 404.1520(a)(4); *Lounsbury v. Barnhart*, 468 F.3d 1111,
14 1114 (9th Cir. 2006).

15 Step one inquires whether the claimant is presently engaged in “substantial
16 gainful activity.” 20 C.F.R. § 404.1520(b). Substantial gainful activity is defined as
17 significant physical or mental activities done or usually done for profit. 20 C.F.R. §
18 404.1572. If the claimant is engaged in substantial activity, he is not entitled to
19 disability benefits. 20 C.F.R. § 404.1571. If not, the ALJ proceeds to step two.

20 Step two asks whether the claimant has a severe impairment, or combination

1 of impairments, that significantly limits the claimant’s physical or mental ability to
2 do basic work activities. 20 C.F.R. § 404.1520(c). A severe impairment is one that
3 has lasted or is expected to last for at least twelve months, and must be proven by
4 objective medical evidence. 20 C.F.R. § 404.1509. If the claimant does not have a
5 severe impairment, or combination of impairments, the disability claim is denied,
6 and no further evaluative steps are required. Otherwise, the evaluation proceeds to
7 the third step.

8 Step three involves a determination of whether any of the claimant’s severe
9 impairments “meets or equals” one of the listed impairments acknowledged by the
10 Commissioner to be sufficiently severe as to preclude substantial gainful activity.
11 20 C.F.R. §§ 404.1520(d), 404.1525, 404.1526; 20 C.F.R. § 404 Subpt. P. App. 1
12 (“the Listings”). If the impairment meets or equals one of the listed impairments,
13 the claimant is *per se* disabled and qualifies for benefits. *Id.* If the claimant is not
14 *per se* disabled, the evaluation proceeds to the fourth step.

15 Step four examines whether the claimant’s residual functional capacity
16 enables the claimant to perform past relevant work. 20 C.F.R. § 404.1520(e)-(f). If
17 the claimant can still perform past relevant work, the claimant is not entitled to
18 disability benefits and the inquiry ends. *Id.*

19 Step five shifts the burden to the Commissioner to prove that the claimant is
20 able to perform other work in the national economy, taking into account the

1 claimant's age, education, and work experience. *See* 20 C.F.R. §§ 404.1520(g),
2 404.1560(c). To meet this burden, the Commissioner must establish that (1) the
3 claimant is capable of performing other work; and (2) such work exists in
4 "significant numbers in the national economy." 20 C.F.R. § 404.1560(c)(2);
5 *Beltran v. Astrue*, 700 F.3d 386, 388-89 (9th Cir. 2012).

6 **III. Standard of Review**

7 A district court's review of a final decision of the Commissioner is governed
8 by 42 U.S.C. § 405(g). The scope of review under § 405(g) is limited, and the
9 Commissioner's decision will be disturbed "only if it is not supported by
10 substantial evidence or is based on legal error." *Hill v. Astrue*, 698 F.3d 1153,
11 1158-59 (9th Cir. 2012) (citing § 405(g)). Substantial evidence means "more than a
12 mere scintilla but less than a preponderance; it is such relevant evidence as a
13 reasonable mind might accept as adequate to support a conclusion." *Sandgathe v.*
14 *Chater*, 108 F.3d 978, 980 (9th Cir. 1997) (quoting *Andrews v. Shalala*, 53 F.3d
15 1035, 1039 (9th Cir. 1995)) (internal quotation marks omitted). In determining
16 whether the Commissioner's findings are supported by substantial evidence, "a
17 reviewing court must consider the entire record as a whole and may not affirm
18 simply by isolating a specific quantum of supporting evidence." *Robbins v. Soc.*
19 *Sec. Admin.*, 466 F.3d 880, 882 (9th Cir. 2006) (quoting *Hammock v. Bowen*, 879
20 F.2d 498, 501 (9th Cir. 1989)).

1 In reviewing a denial of benefits, a district court may not substitute its
2 judgment for that of the ALJ. *Matney v. Sullivan*, 981 F.2d 1016, 1019 (9th Cir.
3 1992). If the evidence in the record “is susceptible to more than one rational
4 interpretation, [the court] must uphold the ALJ's findings if they are supported by
5 inferences reasonably drawn from the record.” *Molina v. Astrue*, 674 F.3d 1104,
6 1111 (9th Cir. 2012); *see also Thomas v. Barnhart*, 278 F.3d 947, 954 (9th Cir.
7 2002) (if the “evidence is susceptible to more than one rational interpretation, one
8 of which supports the ALJ’s decision, the conclusion must be upheld”). Moreover,
9 a district court “may not reverse an ALJ's decision on account of an error that is
10 harmless.” *Molina*, 674 F.3d at 1111. An error is harmless “where it is
11 inconsequential to the [ALJ's] ultimate nondisability determination.” *Id.* at 1115.
12 The burden of showing that an error is harmful generally falls upon the party
13 appealing the ALJ's decision. *Shinseki v. Sanders*, 556 U.S. 396, 409-10 (2009).

14 IV. Statement of Facts

15 The facts of the case are set forth in detail in the transcript of proceedings
16 and only briefly summarized here. Plaintiff was 50 years old at the alleged date of
17 onset. AR 125. He completed the twelfth grade and two years of law enforcement
18 training. AR 144. Plaintiff is able to communicate in English. AR 142. Plaintiff has
19 past work as a long-haul trucker. AR 144, 162-63. Plaintiff reported that he
20 stopped working on October 31, 2007 due to legal issues. AR 143.

VI. Issues for Review

Plaintiff argues that the Commissioner's decision is not free of legal error and not supported by substantial evidence. Specifically, he argues the ALJ erred by: (1) improperly rejecting Plaintiff's subjective symptom testimony; and (2) failing to properly consider and weigh the opinion of Jordan Espiritu, M.D.

VII. Discussion

A. The ALJ did not err in finding Plaintiff’s symptom statements were not entirely consistent with the medical evidence and other evidence in the record.

An ALJ engages in a two-step analysis to determine whether a claimant’s testimony regarding subjective symptoms is reliable. *Tommasetti v. Astrue*, 533 F.3d 1035, 1039 (9th Cir. 2008). First, the claimant must produce objective medical evidence of an underlying impairment or impairments that could reasonably be expected to produce some degree of the symptoms alleged. *Id.* Second, if the claimant meets this threshold, and there is no affirmative evidence suggesting malingering, “the ALJ can reject the claimant’s testimony about the severity of [his] symptoms only by offering specific, clear, and convincing reasons for doing so.” *Id.*

In weighing a claimant's symptom statements, the ALJ may consider many factors, including, “(1) ordinary techniques of credibility evaluation, such as the

1 claimant's reputation for lying, prior inconsistent statements concerning the
2 symptoms, and other testimony by the claimant that appears less than candid; (2)
3 unexplained or inadequately explained failure to seek treatment or to follow a
4 prescribed course of treatment; and (3) the claimant's daily activities.” *Smolen v.*
5 *Chater*, 80 F.3d 1273, 1284 (9th Cir. 1996). When evidence reasonably supports
6 either confirming or reversing the ALJ's decision, the Court may not substitute its
7 judgment for that of the ALJ. *Tackett v. Apfel*, 180 F.3d 1094, 1098 (9th Cir.
8 1999). Here, the ALJ found that the medically determinable impairments could
9 reasonably be expected to produce the symptoms Plaintiff alleges; however, the
10 ALJ determined that Plaintiff’s statements of intensity, persistence, and limiting
11 effects of the symptoms were not entirely consistent with the medical evidence and
12 other evidence in the record. AR 28. Specifically, the ALJ found that Plaintiff’s
13 symptom statements were undermined by the medical evidence in the record and
14 his attempt at fleeing from police in 2008. AR 28.

15 First, the ALJ found that Plaintiff’s allegations of completely disabling
16 limitations were inconsistent with the medical evidence. AR 28. This
17 determination is supported by substantial evidence in the record. Inconsistency
18 between a claimant’s allegations and relevant medical evidence is a legally
19 sufficient reason to reject a claimant’s subjective testimony. *Tonapetyan v. Halter*,
20 242 F.3d 1144, 1148 (9th Cir. 2001). However, this cannot be the only reason for

1 rejecting a claimant's symptom statements. *Rollins v. Massanari*, 261 F.3d 853,
2 857 (9th Cir. 2001).

3 Here, the ALJ found that despite Plaintiff's allegations that his left leg injury
4 resulted in difficulties with lifting, squatting, bending, standing, walking, kneeling,
5 and climbing stairs, that there was no follow up indicating any problems with this
6 left leg or other complications after his surgery in 2007 and prior to his date last
7 insured on December 31, 2010. AR 28. On his Function Report dated June 25,
8 2014, Plaintiff alleged that "lifting more than 100 lbs hurts my back, squatting
9 hurts my ankle [sic.], bending over makes me dizzy. Standing makes my feet swell,
10 walking irritates my arthritis, kneeling hurts my knees, . . . stairs hurt my ankle
11 [sic.]" AR. 159. He stated he could walk a couple of miles before needing to stop
12 and rest for five to ten minutes. *Id.* The ALJ found these allegations inconsistent
13 with the medical evidence. AR 28. Plaintiff was in a motorcycle accident on April
14 12, 2007 that resulted in "a grade 3 open tibia fracture with a shaft fracture of the
15 tibia and fibula. Also, his navicular in the foot was in multiple pieces and
16 dislocated. An open wound was present in the foot." AR 523. He received two
17 surgeries and intramuscular rodding. AR 529-30. Plaintiff was discharged on April
18 20, 2007. AR 523. On August 23, 2007, Plaintiff was seen in the emergency room
19 following an assault. AR 227. Imaging of the left foot showed the intramedullary
20 rod, marked degenerative changes in the mid foot, and fragmentation of the

1 navicular. Tr. 231-32. Plaintiff was treated at the emergency room following an
2 attempt to escape police custody on November 1, 2008, and imaging showed
3 “Patient is status post placement of intramedullary rod across a distal tibial fracture
4 with screws also seen in the medial malleolus. Healed mildly offset distal fibular
5 fracture. No acute fractures are identified.” AR. 233, 237. Imaging from November
6 6, 2009 showed a healed medullary rod plate and screws, posttraumatic sclerosis-
7 dissolution tarsal navicular bone suggesting posttraumatic avascular necrosis and
8 fragmentation, and posttraumatic sclerotic midtarsal osteoarthritic reaction. AR
9 278. The only other medical evidence in the record prior to the date last insured are
10 from Plaintiff’s incarceration. He was treated for nightmares, poor sleep, and
11 hypertension. AR 362-70, 384. While providing his medical history during
12 incarceration, he reported that his left ankle was painful and swollen and needed
13 surgery. AR 246.

14 At no point did Plaintiff present to medical professionals following his
15 surgery requesting treatment for the alleged symptoms stemming from the initial
16 left leg injury. Therefore, the imaging reports support the ALJ’s conclusion that
17 Plaintiff had a medically determinable impairment through could reasonably be
18 expected to produce some of the alleged symptoms. AR 28. However, the lack of
19 medical evidence demonstrating that he sought treatment prior to the date last
20 insured undermines his severity of reported symptoms. Unexplained or

1 inadequately explained reasons for failing to seek medical treatment casts doubt on
2 a claimant's subjective complaints. *Fair v. Bowen*, 885 F.2d 597, 603 (9th Cir.
3 1989). Therefore, the ALJ's first reason for rejecting Plaintiff's symptom
4 statements is supported by substantial evidence and meets the specific, clear and
5 convincing standard.

6 Second, the ALJ found that Plaintiff's attempted escape from police custody
7 demonstrated a greater functional ability than alleged. AR 28. An ALJ may
8 discount a claimant's symptoms statements when his reported activities contradict
9 his allegations. *Orn v. Astrue*, 495 F.3d 625, 639 (9th Cir. 2007). Here, despite his
10 alleged severe left leg impairment, Defendant "was in handcuffs in the back of a
11 patrol vehicle when he broke out the window, exited through the window, and ran
12 up a local hillside where he was at large for approximately an hour" and had to be
13 retrieved by a canine unit on November 1, 2008. AR 233. The ALJ found that
14 "[f]rom this record, it is clear that the claimant was not experiencing any residual
15 problems with his left leg." AR 28.

16 On February 24, 2017, Plaintiff provided a statement alleging that he was on
17 medication at the time of the incident to help him heal from his left leg injury that
18 made him "function in an unrealistic way," and that he did not run because he was
19 handcuffed and wearing a cast on his left leg. AR 225-26. However, there is no
20 evidence in the record that Plaintiff received such a "steroid" or was placed in a

1 cast prior the incident. Therefore, substantial evidence supports the ALJ's
2 determination that the attempted escape from police custody demonstrated a lack
3 of residual problems with the left leg. This meets the specific, clear and convincing
4 standard.

5 Defendant identified additional reasons the ALJ rejected Plaintiff's symptom
6 statements: Plaintiff's activities of walking in the park and going shopping and his
7 ability to function socially. ECF No. 15 at 16-17. However, these activities were
8 identified by the ALJ as a part of assessing the severity of Plaintiff's psychological
9 impairments under the section 12.00C of the Listing of Impairments, and not as an
10 assessment of Plaintiff's symptom statements. AR 29. Therefore, these amount to
11 post hoc rationalizations, which will not be considered by the Court. *See Orn*, 495
12 F.3d at 630 (The Court will "review only the reasons provided by the ALJ in the
13 disability determination and may not affirm the ALJ on a ground upon which he
14 did not rely.").

15 When the ALJ presents a reasonable interpretation that is supported by the
16 evidence, it is not the role of the courts to second-guess it. *Rollins*, 261 F.3d at 857.
17 The Court "must uphold the ALJ's findings if they are supported by inferences
18 reasonably drawn from the record." *Molina*, 674 F.3d 1104, 1111; *see also*
19 *Thomas*, 278 F.3d 947, 954 (if the "evidence is susceptible to more than one
20 rational interpretation, one of which supports the ALJ's decision, the conclusion

1 must be upheld”). The Court does not find the ALJ erred when discounting
2 Plaintiff’s symptom statements because the ALJ properly provided multiple
3 specific, clear and convincing reasons for doing so.

4 **B. The ALJ was not required to address the opinion of Jordan Espiritu,**
5 **M.D.**

6 Plaintiff argues that the ALJ was required to give Dr. Espiritu’s opinion
7 great weight. ECF No. 12 at 15.

8 The Ninth Circuit has distinguished between three classes of medical
9 providers in defining the weight to be given to their opinions: (1) treating
10 providers, those who actually treat the claimant; (2) examining providers, those
11 who examine but do not treat the claimant; and (3) non-examining providers, those
12 who neither treat nor examine the claimant. *Lester v. Chater*, 81 F.3d 821, 830 (9th
13 Cir. 1996) (as amended).

14 A treating provider’s opinion is given the most weight, followed by an
15 examining provider, and finally a non-examining provider. *Id.* at 830-31. In the
16 absence of a contrary opinion, a treating or examining provider’s opinion may not
17 be rejected unless “clear and convincing” reasons are provided. *Id.* at 830. If a
18 treating or examining provider’s opinion is contradicted, it may be discounted for
19 “specific and legitimate reasons that are supported by substantial evidence in the
20 record.” *Id.* at 830-31.

1 Dr. Espiritu completed a Physical Functional Evaluation form on June 3,
2 2014 for the Washington Department of Social and Health Services. AR 386-94.
3 He diagnosed Plaintiff with a left ankle fracture, hypertension, and hearing loss.
4 AR 387. He opined that the left ankle fracture resulted in moderate limitations in
5 the activities of standing, walking, lifting, carrying, handling, pushing, and pulling.
6 *Id.* He further opined that Plaintiff was limited to sedentary work. AR 388. The
7 ALJ did not address Dr. Espiritu's opinion in her decision. AR 23-30.

8 The Ninth Circuit has found that "reports containing observations made after
9 the period for disability are relevant to assess the claimant's disability," and
10 "medical reports are inevitably rendered retrospectively and should not be
11 disregarded solely on that basis." *Smith v. Bowen*, 849 F.2d 1222, 1225 (9th Cir.
12 1988). However, the ALJ is not required to discuss evidence that "is neither
13 significant nor probative." *Howard ex rel. Wolff v. Barnhart*, 341 F.3d 1006, 1012
14 (9th Cir. 2003). Here, nothing in Dr. Espiritu's 2014 opinion establishes that it is
15 retrospective and addresses the period prior to the December 31, 2010 date last
16 insured. Considering there were over three years between the relevant period and
17 when the Physical Functional Evaluation form was completed, the opinion was not
18 probative. Therefore, the ALJ's failure to discuss it was not an error.

19 Plaintiff argues that his left leg impairment did not improve following the
20 initial injury. ECF No. 17 at 5, 7. He asserts that if he were limited to sedentary

1 work in 2014, then he was limited to sedentary work prior to the December 31,
2 2010 date last insured. *Id.* However, this is inconsistent with his own testimony,
3 that since the injury occurred his leg has continued to get worse. AR 41. The Court
4 will not disturb the ALJ's decision.

5 **VIII. Conclusion**

6 The burden of establishing the existence of a medically determinable severe
7 impairment prior to the date last insured at step two is squarely on Plaintiff.
8 *Tackett*, 180 F.3d at 1098-99. Here, the ALJ found that Plaintiff failed to meet the
9 burden with the limited evidence provided in the record. The Court will not disturb
10 that determination.

11 Having reviewed the record and the ALJ's findings, the Court finds the
12 ALJ's decision is supported by substantial evidence and is free from harmful legal
13 error. Accordingly, **IT IS ORDERED:**

14 1. Plaintiff's Motion for Summary Judgment, **ECF No. 12**, is **DENIED**.

15 2. Defendant's Motion for Summary Judgment, **ECF No. 15**, is

16 **GRANTED.**

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1 3. Judgment shall be entered in favor of Defendant and the file shall be
2 **CLOSED.**

3 **IT IS SO ORDERED.** The District Court Executive is directed to enter this
4 Order, forward copies to counsel and **close the file.**

5 **DATED** this 13th day of September, 2019.

6 *s/Robert H. Whaley*
7 ROBERT H. WHALEY
 Senior United States District Judge